

Initially, claimant raises several objections regarding evidence provided at the preliminary hearing in this matter. The difficulty with the majority of complaints noted by claimant in her Application for Review by the Worker's Compensation Board is that there were no contemporaneous objections made at the preliminary hearing with regard to any witness testifying, any failure to produce evidence before the preliminary hearing or objections regarding alleged ex parte communications. Such failure to object does not afford the ALJ the opportunity to address the complaints or provide a record for consideration by the Board upon an appeal.

Moreover, there are procedural remedies to seek recusal of the ALJ if counsel concludes that the ALJ is biased based upon alleged ex parte communications. And an allegation of bias based upon ex parte communication should not be lightly made. Again, there is no evidentiary record available for Board review absent contemporaneous objections and a full evidentiary record detailing the issue. In this case the record simply reveals both counsel met with the ALJ before the preliminary hearing regarding a potential security issue. If there were additional ex parte communications, then objections should have been lodged on the record before the matter proceeded to hearing.

As previously noted, the claimant failed to make contemporaneous objections with the exception of the video evidence. When the video evidence was offered the ALJ left the record open to afford claimant an opportunity to lodge any objections after giving claimant's counsel the opportunity to review the video after the preliminary hearing. The following colloquy occurred:

MR. HOFFMEISTER: Judge, I would ask to submit the video, the CD of the material, the video from the hospital cameras.

JUDGE HOWARD: The attorney for claimant has just received a copy of it. I'll give you 24 hours to make any objections you have, and before you leave we'll give you an e-mail or a fax number that you can make those objections through.

MR. BRETZ: Thank you.¹

It is significant to note that claimant's attorney did not at that time lodge any objection to the video on the record.

However, the day after the preliminary hearing the ALJ's legal assistant sent an e-mail to respondent's counsel requesting another copy of the DVD of the video as the exhibit offered at the hearing could not be viewed. Claimant's counsel was copied on the e-mail. Claimant's counsel then sent an e-mail to the ALJ's legal assistant addressed to the ALJ which noted that claimant's counsel had likewise been unable to view the copy of the video that respondent's counsel had provided. Claimant's counsel then lodged an

¹ P.H. Trans. at 35.

objection to the video because it was not provided prior to the hearing and further noted that the failure to produce the video or to identify witnesses so they could be deposed before the hearing denied claimant's right to due process and confrontation of witnesses.

The ALJ's legal assistant then responded with an e-mail which provided:

After discussing your emails with the Judge his suggestions are as follows:

1. The purpose of my original email was to notify all the parties of the video problem.
2. At the hearing claimant was advised to file objections, if any, to the video within 24 hours of the hearing. Since claimant has been unable to view the recording, the 24 hours has not begun. It will begin when claimant receives a viewable copy of the video.
3. Make any objections pursuant to the hearing discussion via fax, not in the form of emails and responses to emails.

We will notify all parties via email when we receive a viewable copy. Respondent is to provide a viewable copy to claimant's attorney of record on the same date the Court receives a viewable copy.²

Claimant's counsel states he did not receive an email notifying him that the ALJ had received a viewable copy of the video and that he received the video on July 18, 2011. But the ALJ's Order was entered on July 15, 2011, which eliminated his ability to view the video and then make his objections as directed by the email from the ALJ's legal assistant.

Claimant's counsel argues that he was denied due process because he was not afforded the opportunity to view the video and then lodge his objections as he had been told.

Workers compensation proceedings have been and remain adversarial proceedings.³ Although not bound by the technical rules of procedure, the ALJ is required to give the parties a reasonable opportunity to be heard and to present evidence, to ensure the employee an expeditious hearing and to act reasonably without partiality.⁴

² Claimant's Brief, Ex. 3 (filed Aug. 5, 2011).

³ *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 281, 949 P.2d 613 (1997).

⁴ K.S.A. 44-523(a).

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.⁵ The Kansas Supreme Court has recognized in numerous cases that the right to cross-examine witnesses testifying at administrative hearings of a quasi-judicial character is an important requirement of due process.⁶

In *Adams*⁷, the Kansas Supreme Court stated:

In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

'An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . . .'

The requirements of an administrative hearing of a judicial or quasi-judicial character are phrased in this language in 2 Am. Jur.2d, Administrative Law, § 412, p. 222:

'. . . A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing has been denied, the administrative action is void. . . .'

In this instance, the claimant was told at the preliminary hearing that he would be afforded the opportunity to view the video which had been offered into evidence and then lodge any objections. But the video was not viewable and claimant was told that a new copy would be provided and his time to view the video and offer objections was extended until he and the ALJ were provided viewable copies. However, the ALJ admitted the video as evidence and specifically relied upon it in an order issued before the claimant had been provided a viewable copy and afforded the opportunity to lodge objections.

⁵ *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 473 P.2d 72 (1970).

⁶ *Wulfschuh v. Kansas Dept. of Revenue*, 234 Kan. 241, 671 P.2d 547 (1983).

⁷ *Adams v. Marshall*, 212 Kan. 595, 601-602, 512 P.2d 365 (1973).

K.S.A. 44-555c(a) provides: "The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."

The Board is bound by the record made before the administrative law judge and in this case the record indicates the claimant would be afforded the opportunity to view the video and lodge her objections. However, issuing an order without providing the claimant the opportunity to view the video and lodge objections was a denial of due process. Based upon the record compiled to date, this Board Member finds this matter should be remanded to the ALJ with instructions to reopen the record and allow claimant the opportunity to lodge any objections to the video.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁸ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated July 15, 2011, is reversed and remanded to reopen the record to allow claimant the opportunity to lodge any objections to the video offered into evidence by the respondent.

IT IS SO ORDERED.

Dated this _____ day of September, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Mark J. Hoffmeister, Attorney for Self-Insured Respondent
Steven J. Howard, Administrative Law Judge

⁸ K.S.A. 44-534a.